JAMES [illegible] Clerk

In the

Supreme Court of the United States

[illegible]

No. [illegible]

[illegible]

Petitioner

v.

STATE OF CONNECTICUT

Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of Errors Of The State Of Connecticut

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BRIEF OF THE RESPONDENT IN OPPOSITION

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THE WHARLES B. ELLIS CO., NEW HAVEN, CONN.

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OCTOBER TERM 1961

No. 212

LORING J. WHITESIDE,
Petitioner
vs.
STATE OF CONNECTICUT,
Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of Errors Of the State of Connecticut

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BRIEF OF THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Errors of the State of Connecticut is reported in 148 Conn. Reports 208.

JURISDICTION

The petitioner claims that jurisdiction is conferred on this Court by the provisions of 28 U.S.C. 1257 (3) which permit review of

a right, privilege or immunity which is "specially set up or claimed under the Constitution." The right now asserted was not raised in the Connecticut Supreme Court of Errors until the respondent, following the court's unfavorable decision, included it for the first time in his motion to reargue the appeal. The court denied the motion without reference to the constitutional question. Since the claimed violation of a constitutional right was not seasonably raised in accordance with state law this Court is without jurisdiction to review the question. In further motions to correct the record and for certification that a federal question was raised the respondent again urged the claimed violation of his constitutional rights but the Connecticut court rejected these on the ground that the claims were not included in the assignments of error (R. 92-98) in accordance with the rules of practice. Connecticut Practice Book, Sec. 409.

QUESTIONS PRESENTED

1. Did the denial of the petitioner's motion for a bill of particulars in the trial court present a reviewable federal question in view of the fact that the petitioner did not seasonably claim any right under the Constitution in accordance with the requirements of Connecticut rules of practice?

2. Did the trial court's denial of a bill of particulars violate due process if it was in accordance with state practice and the petitioner was fully informed of the charges against him?

3. Did the Supreme Court of Errors of Connecticut disclose a state of prejudice against the petitioner so that it could not render a fair and impartial decision in the case thus depriving the petitioner of liberty and property without due process of law?

STATUTES INVOLVED

United States Constitution, Amendments VI and XIV.

STATEMENT

In November 1958 the petitioner was arrested for publishing many defamatory statements about a number of persons in and around New Haven, Connecticut. The libels were published by him in a weekly paper called "The Grapevine Press." He was first tried in the City Court of New Haven and convicted of twenty-four counts. He appealed to the Criminal Court of Common Pleas for New Haven County and was found guilty on four of the original counts and acquitted on nineteen. The information was prepared charging the petitioner with violations of Sec. 8518 of the General Statutes, Revision of 1949, now known as Sec. 53-174, Revision of 1959. (R. 2-8) The petitioner filed a motion for a bill of particulars which was denied. (Petitioner's App. A40-41) He thereafter filed a demurrer to the information one of the grounds of which was that the information failed to inform him of the nature and cause of the accusation against him in violation of the Constitution of the United States, Article VI (which presumably meant the sixth amendment). (Petitioner's App. A36-37) The court overruled the demurrer. This claim was abandoned until the petitioner included it in his motion to reargue his appeal before the Connecticut Supreme Court of Errors. (Petitioner's App. A9) The court denied the latter motion on April 11, 1961 without comment. A motion to correct the record was subsequently filed and the court ordered the clerk to correct the judgment file as to the jail sentence which had inadvertently been recorded as suspended when in fact it was suspended after five days on each of four counts. Two other reasons urged for the correction of the record are immaterial because they involve a misconception of a finding in a jury case. In Connecticut the finding merely sets forth facts claimed to have been proved by each side. The finding here furnished a fair and adequate basis for testing the errors in law claimed to have been made by the court and no corrections were found warranted. (148 Conn. 208) The im-

portant fact is that the petitioner did not include in his assignment of errors any constitutional claim. (R. 92-98)

ARGUMENT

I.

The Supreme Court Lacks Jurisdiction Because There Was No Federal Question Seasonably Raised By The Petitioner In The State Court.

Under Rule 19 of the Rules of the Supreme Court this petition for a writ of certiorari should be denied. It provides as follows:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

It is mandatory that the state court has decided a federal question of substance. *Rooker* vs. *Fidelity Trust Co.*, 263 U.S. 414, 44 S. Ct. 149; *Beals* vs. *Cone,* 188 U.S. 184, 23 S. Ct. 275. It is clear from the record before the state court that the petitioner through his attorney did not include any federal question in (1) the list of questions of law he desired to have reviewed (R. 13); and (2) his assignment of errors. (R. 92-98) Connecticut rules of practice required that the claims should be incorporated in the assignment of errors in order to be reviewed by the appellate court. Connecticut Practice Book, Sec. 409. Said section provides as follows:

> Sec. 409. Errors considered. This court shall not be bound to consider any errors on an appeal unless they are

specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial.

The record clearly establishes the fact that no federal question was raised prior to the state court decision, and there was none discussed in that opinion. *State* vs. *Whiteside*, 148 Conn. 208. Whether a constitutionally protected right was "specially set up or claimed" or "drawn in question" in the state court is essential to determine in order for this Court to have jurisdiction. 28 U.S.C. Sec. 1257 (3). The Supreme Court is without power to decide whether constitutional rights have been violated where the federal question was not seasonably raised in accordance with state law. *Edelman* vs. *People*, Cal. 1953, 344 U.S. 357, 97 L.Ed. 387.

Whether a federal question was sufficiently and properly raised in the state court is itself a federal question, in the decision of which the Supreme Court is not concluded by the view taken by the highest court of the state. *Carter* vs. *Texas*, 177 U.S. 442, 447, 20 S. Ct. 687; *Rogers* vs. *Alabama*, 192 U.S. 226, 230-231, 24 S. Ct. 257. This rule would not justify this Court in setting aside state rules of practice regulating the method of raising constitutional questions or waiving them if the rules afford the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined. The Connecticut court, in its opinion, discussed and answered all the errors assigned by the petitioner none of which remotely involved any federal question. It was only after the petitioner received the unfavorable decision from the appellate court that he raised a violation of the due process clause for the first time in his motion to reargue the appeal, which motion the court denied without comment. It is essential that the federal question be asserted at a proper time in accordance with state practice and the decision is binding on the Supreme Court

when it is clear that such decision was not rendered in a spirit of evasion for the purpose of defeating the claim of a federal right. *Hartford Life Ins. Co.* vs. *Johnson*, 249 U.S. 490, 493, 39 S. Ct 336; *Atlantic Coast R. Co.* vs. *Mims*, 242 U.S. 532, 535, 37 S. Ct. 188. There was no evasion of a discussion by the state court of any claim by this petitioner. In this connection it is most significant that the petitioner raised a claim of violation of the sixth amendment in a demurrer to the information (Petitioner's App. A36-37) filed in the trial court but he did not pursue this claim in his appeal or assignment of errors filed in connection therewith. The fact that the federal question had been timely and properly raised in the state trial court (as here in the demurrer referred to) will not suffice to authorize the Supreme Court to consider it if the question was not again urged on the appeal to the state appellate court. In such a case the federal question is deemed to have been waived and will not support jurisdiction in this Court. *Caperton* vs. *Bowyer*, 14 Wall. 216, 236; 20 L. Ed. 882; *Hulbert* vs. *Chicago*, 202 U.S. 275, 281, 26 S. Ct. 617. Under this doctrine substantial federal questions have failed of review. For example, in the case of *Chandler* vs. *Manifold*, 290 U.S. 665, 54 S. Ct. 93, the complainant in the Colorado trial court specifically claimed full faith and credit for a Minnesota judgment on which the suit was based. On writ of error to the Supreme Court of Colorado to review the adverse judgment of the trial court, the complainant, by his assignment of errors limited the question in that court, by presenting as his sole contention the argument that the trial court had misinterpreted the effect of the foreign decree under the foreign law. The Supreme Court of Colorado considered that question only and affirmed. A petition to the Supreme Court for certiorari asserted that the Colorado courts had erroneously denied full faith and credit to the Minnesota judgment. The petition was denied "upon the ground that the alleged federal question was not properly presented to the Supreme Court of Colorado," on the authority of *Caperton* vs. *Bowyer*,

supra; Hulbert vs. *Chicago, supra;* and other cases. The foregoing case is authority for denying the petition in this case and for the same reason that the federal question was not properly presented to the Connecticut Supreme Court of Errors.

There is no need to determine whether the sixth amendment is incorporated in the due process clause of the fourteenth amendment because it is academic since this Court lacks jurisdiction to review. We know that the petitioner was entitled to have his case tried with due process of law but that does not mean that he can disregard the state rules of practice when they afforded him a reasonable opportunity to assert any and all claims he might believe he had.

II.

The Petitioner Was Properly Informed Of The Nature And Cause Of The Accusation Against Him And A Denial Of A Bill Of Particulars Did Not Violate The Due Process Clause.

The trial court denied the petitioner's motion for a bill of particulars which it had discretion to do. Connecticut Practice Book, Sec. 345. The petitioner's claim is really based on the denial of said motion for a bill of particulars. Under the sixth amendment the accused, in a federal court, is entitled to be informed of the nature and cause of the accusation against him. Although this is applicable to federal courts only the modern theory is that it should be included in the due process clause as it is applied to the review of convictions in the criminal cases in the state courts, see *Mapp* vs. *Ohio*—U.S. (June 1961). Accepting the latter theory in the most favorable aspect to the petitioner we find that the petitioner was fully informed of the nature and cause of the accusation against him. The background of the charges reveal that the defendant was first tried in the City Court of New Haven and found guilty on twenty-four counts after a full hearing. His appeal to the Court of Common Pleas was based on the same charges.

Each count specified the charge, the names of the parties libelled, the date and the specific number of the paper containing the libels. In addition to this the defendant admitted writing, printing and publishing the papers and having a copy of each in his possession. In other words he composed and possessed his own bill of particulars which formed the basis of the charges. Certainly one who assumes the superior position of being so well informed on the subject concerning which he was writing and publishing his conclusions and deductions from the facts in his possession, was not misled or misinformed that he was unable to defend himself against the charge of libel made against them soon thereafter.

Baker vs. *State*, 199 Ark. 1005, 1375, W.2d 938, *certiorari denied*, 311 U.S. 666.

In the state court his only claim regarding the information was that the counts did not include an allegation of malice and therefore was defective. The court found that the information was not defective as claimed. (148 Conn. 208, 210)

The information was prepared in accordance with the Connecticut rules of practice. (Practice Book, Sec. 344)

The foregoing indicates that even if the respondent had seasonably raised a constitutional question based on the fourteenth and sixth amendments the facts do not support his claim that he was not properly informed of the charges.

III.

The respondent does not intend to dignify the claim of the petitioner asserting prejudice on the part of the judges and justices participating in the various state court hearings by answering it. It follows the same pattern as the various weekly publications which indicate that the petitioner was motivated by convictions that found expression in abusive, offensive, indecent and scurrilous writings. The case of *Whiteside* vs. *Connecticut*, 148 Conn. 77,

cited in the petitioner's petition and appendix is not material to the question raised here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE R. TIERNAN,
RALPH H. CLARK,
Counsel for Respondent.

July 27, 1961.